90-1339

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LEONARD COHEN,

Petitioner,

vs.

ERNESTINE BERGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

LEONARD COHEN, *Pro Se*
Counsel of Record
66 Beverly Road
Great Neck, New York 11021
(516) 487-4994

QUESTIONS PRESENTED

1. Is New York City Rent Stabilization Code § 2523.5(b)(2) which authorizes a family member who did not reside in the apartment from the inception of the tenancy, but resided with the tenant for two or more years prior to the tenant's death to be entitled to a renewal lease, invalid as a governmental unlawful taking of private property for public use without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Is such a regulation invalid as a deprivation of private property without due process of law in violation of the Fourteenth Amendment to the U. S. Constitution?

3. Is such a regulation invalid because it subjects a person to involutary servitude in violation of § 1 of the Thirteenth Amendment to the U. S. Constitution?

PARTIES

In addition to parties named in caption, a copy of this petition is being served on Attorney General as 28 U.S.C. §2403(b) may be applicable

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REPORTED DECISIONS BELOW

The N.Y. Court of Appeals order which dismissed petitioner's appeal on grounds that no substantial constitutional question is directly involved in the appeal has not been published at this time.

The decision and order of the N.Y. Appellate Division, Second Department reversing the lower court's order granting petitioner summary judgment is reported at 153 AD2d 920, 545 NYS2d 728.

The N.Y. Supreme Court order and the memorandum granting petitioner's motion for summary judgment has not been published at this time.

JURISDICTION

This is an action which challenges a government regulation which gives total exclusive possession of petitioner's apartment to respondent, requires petitioner to maintain the apartment while respondent possesses it, and requires the petitioner to assume responsibilities to protect the health and welfare of the person of the respondent and all those other persons which respondent allows into the apartment, all without just compensation and against the will of the petitioner. This appeal is taken from the order of the N. Y. Court of Appeals, dated

and entered on November 27, 1990, which determined that there is no substantial constitutional question and challenge to this governmental regulation. Notice of Appeal was filed in the N.Y. Supreme Court, Queens County on June 2, 1988.

This Court has jurisdiction to decide this appeal pursuant to 28 U.S.C. § 1257(a) because the validity of this regulation has been drawn into question on the ground of its being repugnant to the Fifth, Thirteenth and Fourteenth Amendments to the U.S. Constitution, but has been found to be constitutionally valid by the N.Y. Court of Appeals, the highest court of the State.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The regulation challenged by petioner is known by two differant citations, RSC2523.5(b)(2) and 9NYCRR2523.5(b)(2). Petitioner will use the citations interchangably, but they refer to the same regulation which is:

> "...if the tenant is deceased at the expiration of the lease term, such tenant's family member who has not resided in the housing accommodation since the inception of the tenancy or the commencement of the relationship, but who has been residing with such tenant in the housing accommodation as a primary resident for a period of no less than two (2) years immediately prior to the death of the tenant...such family member shall be entitled to a renewal lease."

Petitioner asserts that this regulation is unconstitutional under the U.S. Constitution because it violates the Fifth Amendment* which provides:

> "...nor shall private property be taken for public use without just compensation."

and the Fourteenth Amendment which provides:

> "...nor shall any State deprive any person of...property, without due process of law."

and the Thirteenth Amendment which provides:

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*The Fourteenth Amendment incorporates the taking clause of the Fifth Amendment and makes it applicable to the States. (*Pennsylvania Coal Co. v Mahon*, 260 US 393 (1922)

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States..."

Statement of the Case

Facts

This appeal does not involve a dispute between a landlord and tenant.

This appeal does involve a regulation promulgated by the Commissioner of the New York State Division of Housing and Community Renewal which gives total possession of petitioner's coop apartment to a stranger (respondent) and forces these two strangers who are not in a landlord and tenant relationship to enter into a landlord and tenant relationship against the will of the petitioner.

The petitioner is the owner of a coop apartment, 5E, located at 1430 Seagirt Blvd., in the County of Queens, City and State of New York which was subject to the New York City Rent Stabilization Law. In 1964 the apartment was leased to tenants Harry Silverman and

Eva Silverman. A few years later the tenants' daughter, Ernestine Berger divorced her husband and moved into the apartment with her parents. This additional occupancy was done without the knowledge or the consent of the petitioner. A few years later Harry Silverman died and Eva Silverman remained in the apartment as the sole tenant of record. From the start of the tenancy all written leases and renewal of lease agreements for this apartment were made in the name of Harry Silverman and Eva Silverman while Harry Silverman was alive and all subsequent leases and renewal of lease agreements for this apartment were made in the name of Eva Silverman. None of the leases and renewal of lease agreements for this apartment were ever made with or in the name of the respondent, Ernestine Berger.

After Harry Silverman died, petitioner believed that Eva Silverman did not have the

financial means to pay the rent. On August 30, 1985 petitioner wrote to respondent and said that if respondent would agree to also be responsible with her mother for the payment of the rent for the apartment, the petitioner would include the respondent as a tenant on the new lease agreement which was to begin on November 1, 1985. The offer was refused by a writing in which respondent said:

> "Dear Mr. Cohen:
> I am acting in my mother's behalf in advising you My Mother is desirous of having the lease remain in her name, for a two (2) year period. Thank you
> E. Berger"
> (Emphasis supplied by Respondent)
> (R.48)

The petitioner then prepared and entered into a written lease renewal agreement with Eva Silverman which agreement commenced on November 1, 1985 and was to terminate on October 31, 1987. This turned out to be the last lease renewal agreement which was made between petitioner and Eva Silverman because on December 23, 1985, less

than 2 months after the lease renewal agreement began, Eva Silverman died. Respondent never notified petitioner that her mother died. A year and a half later, on June 17, 1987, petitioner believing that Eva Silverman was alive, mailed a letter to Eva Silverman informing her that her lease was expiring on October 31. 1987 and that she could renew the lease for another year or two. This letter was mailed to Mrs. Silverman pursuant to the requirements of the Rent Stabilization Code. In late August 1987 petitioner received a note from the respondent asking that the lease be renewed for one year. Nowhere in this note did respondent say that Eva Silverman died. Petitioner, believing that Eva Silverman was alive, on September 2, 1987 prepared a new one year lease renewal agreement in the name of Eva Silverman and mailed it to her. A couple of weeks later petitioner received a letter from respondent in which she said for the first time that Eva Silverman is deceased and would

petitioner change the name on the lease to Ernestine Berger. (R.34) On October 10, 1987 petitioner wrote to respondent that petitioner does not recognize respondent as a tenant in this apartment and that respondent should vacate the apartment no later than October 31, 1987 when the last lease agreement made with Eva Silverman expired. (R.35) On October 31, 1987 the last lease agreement made with Eva Silverman expired, but respondent still remained in the apartment and refused to move.

Petitioner then instituted this lawsuit in the New York State Supreme Court in the County of Queens for a declaratory judgment, possession of the apartment and monies for the fair value for use and occupancy. The respondent defended. By notice of motion and affidavit, both dated December 12, 1987, petitioner moved for summary judgment. (R.29 and 30) Respondent's only defense to this lawsuit was that respondent had resided in

the apartment with the tenant, her mother, for no less than two years prior to the tenant's death, and that as a matter of law she was entitled to a renewal lease pursuant to New York City Rent Stabilization Code section 2523.5(b)(2). (R.37) The Court, finding that the facts in the case were undisputed, granted petitioner's motion for summary judgment and found RSC 2523.5(b)(2) to be invalid and held that respondent was not entitled to a renewal lease. (App. 21) On April 7, 1988 the Court made an order ejecting respondent from the apartment and setting a date for an inquest to determine the fair value for the use and occupancy of the apartment. (App. 9)

The respondent appealed to the N.Y. Appellate Division, Second Department, which reversed the lower court on the law, declared 9NYCRR 2523.5(b)(2) valid, and found respondent to be entitled to a renewal lease for the subject apartment. (App. 3,4)

The petitioner then appealed to the N. Y. Court of Appeals. The respondent made a motion to dismiss the appeal which the Court of Appeals granted by an order dated November 27, 1990. Dismissal was on the ground that no substantial constitutional question is directly involved in the appeal. (App. 1) Petitioner, believing that there are constitutional questions involved in this case, now appeals this Court of Appeals order to the Supreme Court of the United States.

The sole question that petitioner asks this Court to decide in this appeal is whether RSC2523.5(b)(2) [also known as 9NYCRR2523.5(b)(2)] violates the United States Constitution, and if it does, for this Court to declare the regulation invalid.

Raising and Disposition of Issues Below

The constitutional questions presented here were first raised in the N.Y. Supreme Court in petitioner's amended complaint where in paragraph 17, petitioner alleged:

> "That to allow the defendant to remain in the apartment under the protection of the Rent Stabilization Law or Code is to deny the plaintiff his rights under the New York State Constitution and the United State Constitution." (R. 24)

The constitutional questions were again raised in the petitioner's motion for summary judgment. After respondent raised the defense of RSC 2523.5(b)(2) in her attorney's opposing affirmation (R.37), petitioner in his reply affidavit stated that the regulation was a taking of petitioner's property for public use without just compensation, without due process and subjected petitioner to involuntary servitude. (R.45) The N. Y. Supreme Court decided the motion in petitioner's favor on the ground that the N. Y. Court of Appeals held in *Sullivan v. Brevard Associates*, 66 NY2d 489 (1985) that there are no succession rights established under the Rent Stabilization Law and a landlord is required to offer a renewal lease only to a tenant of record. (App. 18) The Supreme Court did not address the constitutional questions which petitioner

had raised.

The constitutional questions were again raised by petitioner in the appeal the respondent made to the Appellate Division. In petitioner's brief in opposition, petitioner devoted all of Point II to the argument that RSC2523.5(b)(2) is invalid because it deprives petitioner of due process of law and takes petitioner's property for public use without just compensation. (U.S. Constitution Amendments 5 and 14). All of Point III was devoted to the argument that RSC 2523.5(b)(2) is invalid because it subjects petitioner to involuntary servitude. (U.S.Constitution Amendment 13, section 1). The Appellate Division reversed the Supreme Court on the law and decided the appeal in respondent's favor on the ground that 9NYCRR 2523.5(b)(2) was a valid regulation and that respondent was entitled to a renewal lease. The court did not address the constitutional questions which petitioner had raised. (App. 2)

The same constitutional questions were again raised in petitioner's appeal to the N. Y. Court of Appeals. In a motion made by respondent to dismiss the appeal, the court dismissed the appeal upon the ground that no substantial constitutional question is directly involved in the appeal. (App. 1) Petitioner believes there are substantial constitutional questions involved in this case and appeals this Court of Appeals order to the Supreme Court of the United States. Petitioner respectfully reqests that this court find RSC2523.5(b)(2) [also known as 9NYCRR2523.5(b)(2)] unconstitutional and declare it to be invalid.

GROUNDS FOR PLENARY CONSIDERATION

A. Respondent is not now nor has respondent ever been a tenant in this apartment.

The facts are clear that the respondent has not been and is not now a tenant in this apartment and that no landlord and tenant relationship exists between the parties. Most

importantly, respondent has never claimed to be a tenant. Instead, respondent relies on the fact that she is the daughter of the tenant and under RSC2523.5(b)(2) that she is entitled to become a tenant and receive a renewal lease. Also, when petitioner in 1985 offered respondent the choice to become a tenant on the lease together with her mother if respondent would agree to be liable for the payment of rent, the offer was not accepted. Respondent wrote petitioner that her mother was desirous of having the lease remain only in the mother's name. (R.48) Also RSC 2520.6(d) contains the following definition of a tenant:

> "Tenant. Any person or persons named on a lease as lessee or lessees, or who is or are a party or parties to a rental agreement and obligated to pay rent for the use or occupancy of a housing accommodation."

Since respondent was never named as a lessee on a lease for this apartment and never was a party to a rental agreement or obligated to

pay rent, respondent is not a tenant in this apartment.

It should be emphasized that the arrangement to allow the respondent to move into the apartment was made between the parents and respondent. Petitioner was not a party to this arrangement. Petitioner was not even aware at that time that it was happening. Since the petitioner and respondent are not in the relationship of landlord and tenant then this lawsuit does not involve a dispute between a landlord and tenant. Since there are no agreements between petitioner and respondent with reference to this apartment, they are in the legal sense, strangers.

B. RSC 2523.5(b)(2) authorizes a permanent physical occupation of private property in a *per se* taking prohibited by 5th and 14th Amendments of the United States Constitution.

In previous decisions this Court has invariably found that a permanent occupation of private property for public use under the authority of government is a *per se* taking

requiring just compensation. One of the most explicit and relatively current discussions of this rule is to be found in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982). In that case a N. Y. statute provided that a landlord must permit a cable television company to install its cable facilities upon the roof and side of the owner's building. Although this is a small invasion of the owner's property as compared with the taking of total possession of petitioner's apartment in this case, the Court held:

> "...we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrustion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but is also determinative. When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." (p.426,427)

The *Loretto* Court, referring favorably to a portion of an extensive Harvard Law Review article on eminent domain written by Professor Michelman, stated:

> "Professor Michelman has accurately summarized the case law concerning the role of the concept of physical invasion in the development of takings jurisprudence:
>
> 'At one time it was commonly held that, in the absence of explicit expropriation, a compensable "taking" could occur *only* through physical encroachment and occupation. The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover. The one uncontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, regularly use, or permanently occupy, space or a thing which theretofore was understood to be under private ownership.'
> Michelman, Property, Utility, and Fairness: comments on the Ethical Foundation of "Just Compenstion" Law, 80 Harv. L. Rev. 1165, 1184 (1967) (emphasis in original; footnotes omitted). (p.427 footnote 5)

The *Loretto* Court also said:

> "The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interest." (p. 435)

The Housing Commissioner's reason for promulgating this regulation is his concern that non-tenant occupants in rent stabilized apartments who will no longer be allowed to remain in the apartment after the tenant dies, will have difficulty finding other accommodations in a tight housing market. The Housing Commissioner's purpose for promulgating this regulation is that the regulation will serve the public interest. Eminent domain exists for this reason where private property is taken by government and just compensation is paid. If eminent domain is not used, the fact that the purpose of the taking is worthy does not make it less than a taking or allows the taking without paying just compensation. In the *Loretto* case this Court said:

> "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purpose of the Takings Clause compels its retention. (p.426)"

The *Loretto* Court also holds that what government has taken when it permanently occupies physical property is the owner's right to possess the property, the right to use it, the right to exclude others from using the property, and the right to dispose of the property.

> "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' United States v General Motors Corp., 323 US 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. See Kaiser Aetna, 444 U.S., at 179-180; see also Re-

> statement of Property § 7 (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property... Finally, even though the owner may retain the bare legal title to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." (Emphasis in original; footnote omitted) (p.435,436)

It is this bundle of rights which RSC 2523.5(b)(2) has taken from the the petitioner and it is the value of these rights which government is obligated to pay to petitioner.

The coerced imposition of the requirement of government in RSC 2523.5(b)(2) to enter into a lease with respondent has the effect of not only preventing petitioner from excluding the respondent from the apartment, but the reality that the respondent can and will exclude the petitioner from the apartment the petitioner owns.

All this taking is being done under the authority of government by a stranger with whom petitioner has no agreement and did not choose, and the *Loretto* Court holds that such a taking by a stranger causes a special kind of injury to the property owner.

> "Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property...property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury...". (emphasis in original) (p.436)

The *Loretto* case was followed and cited with favor in *Nollan v. California Coastal Commission*, 483 US 825 (1987). In that case government conditioned the granting of permission to rebuild a house on the Nollans transferring to the public an easement across their waterfront property. This Court held that the appropriation of a public easement across a landowner's property constitutes a

taking of a property interest, not a mere restriction on its use. This was so even though individuals are given a right to pass along the easement, but no particular individual is permitted to station himself upon the premises. This is less of a taking than in this appeal where the respondent and her personal property will be able to stay in the apartment all the time, and this stationing will apply to the entire apartment, not just a part of the property. The nature of a regulatory taking is that the property owner can keep the property, but government restricts its use (e.g. cannot use the property for manufacturing purposes). In a traditional *per se* taking as we have here, the property owner can keep the property, but government gives some part of the owner's property rights to someone else. This is what RSC2523.5(b)(2) is doing. Petitioner believes that the finding of a traditional *per se* taking, rather than a regulatory restricition on use, as was found in

the *Nollan* case, should also be found in this case.

If the respondent lived elsewhere than in this apartment, and the Housing Commissioner promulgated a regulation that upon the death of the tenant, a family member of the tenant was authorized to move into this apartment and receive a renewal lease, petitioner believes there would be no question that this would be an improper taking of petitioner's property. The fact that the tenant, while alive, made an arrangement with a family member and the family member moved into the apartment, without the knowidge or the consent of the owner, should not bind the owner of the apartment, on the death of the tenant, to a landlord and tenant relationship with the family member. It is the general rule of law that A cannot make an agreement with B which will bind C. Yet this is what government is attempting to impose by promulgating RSC2525.5(b)(2).

There is a nexus with the tenant and the family member, but there is no nexus or agreement between the family member and the owner of the apartment. They are strangers to each other. In addition, there is conclusive evidence in this case, in respondent's own handwriting, that the mother did not want the daughter as a named tenant on the lease, merely as an additional occupant in the apartment. (R. 48) Government should not be allowed to nullify or enlarge the agreement the mother made with her daughter, nor should government be allowed to impose such a lease agreement on petitioner.

This is not a situation where a parent and a child move into an apartment at the inception of the tenancy and for some reason (age perhaps) the child is not named on the lease. Years later the parent vacates the apartment and the child (now an adult) wishes to remain. At the inception of the renting the property owner had an

opportunity to know and consent (actually or impliedly) to the additional occupancy. Such a situation is covered by RSC2523.5(b)(1). (Emphasis supplied) Petitioner does not challenge RSC2523.5(b)(1). In this case the situation is different. The apartment was rented to the parents who were the only ones named on the lease. The parents resided in the apartment alone for many years until the daughter (an adult) divorced her husband and moved into the apartment. The owner did not know this additional occupancy was occuring and never consented to it. From the beginning the daughter reaped a windfall. She received all the benefits of the tenancy her parents were entitled to receive from the property owner, but she paid nothing to the property owner for these benefits, not even a promise from the daughter to be responsible for the rent. However, the property owner was burdened with responsibilities and duties which he now owed, not to two persons, but

to three persons. It is this situation which is covered by RSC2523.5(b)(2) (emphasis supplied) and which petitioner challenges as being an improper taking of private property by government and the giving of same to a stranger without just compensation in violation of the 5th and 14th Amendments to the U.S. Constitution.

The requirement of giving a lease to respondent is the equivalent of giving respondent total exclusive possession of this apartment forever. The ability of petitioner to regain possession of the apartment in the future is remote. Once respondent has a lease, the Rent Stabilization Code allows respondent to receive renewal leases during the respondent's lifetime. See RSC 2522.5(b)(1). In addition, there is nothing to prevent the respondent from also taking another family member into the apartment and to repeat the same process complained of here under RSC 2523.5(b)(2), and this

additional family member thereafter bringing another family member into the apartment, *ad infinitum*.

RSC 2523.5(b)(2), even if viewed as regulartory restriction, also constitutes a taking and a deprivation of private property without due process when examined under the police power regulation standards. In *Pennsylvania Coal Co. v Mahon*, 260 US 393, 415, this Court said:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

RSC2523.5(b)(2) goes beyond the bounds of police power regulations by forcing a limited group of people alone to bear public burdens which, in all fairness and justice should be borne by the public at large. The burden is imposed on a selected limited class of rental property owners. The regulation also interferes with the petitioner's reasonable investment-back expectations of selling this

coop apartment at market value while respondent is in possession, because any prospective purchaser will also be unable to possess the apartment, exclude others from using the apartment and himself someday dispose of the apartment at market value. RSC 2523.5(b)(2) also imposes unprecedented affirmative duties and responsibilities on the property owner to maintain the property while it is being occupied, and to ensure the health, saftey and welfare of the person of the occupants. Failure to perform these affirmative duties and responsibilities subjects the owner to substantial criminal and civil penalties. RSC2523.5(b)(2) goes beyond the bounds of police power regulation as to be a taking and deprivation of private property.

C. RSC 2523.5(b)(2) goes beyond the power of Eminent Domain in taking by imposing affirmative duties which subject petitioner to involuntary servitude in violation of the 13th Amendment to the Constitution.

The government's power of eminent domain can impose a harsh result on an owner of real property, but eminent domain has its limitations. In eminent domain, government takes the private property, pays just compensation, and the process comes to an end. RSC 2523.5(b)(2), on the other hand, causes a revolutionary change in the law of eminent domain. RSC 2523.5(b)(2) leaves the property owner with bare title, but takes total possession of the property and requires the owner of the property to enter into a lease with a stranger. The entering into such a lease has important, far reaching and lasting adverse consequences to the property owner because:

a) It gives a stranger total exclusive possession of the apartment,

b) for an unknown indefinate period of time, possibly forever,

c) it also takes away the owner's right to choose who will occupy his apartment and

gives that choice to the tenant, under authority and compulsion of government,

d) it requires the owner to maintain the property while it is being occupied by strangers, and

e) it requires the owner to assume responsibilities, do work and supply services to insure the health, saftey and welfare of the person occuping the apartment and all those other people the occupier will allow into the apartment,

f) all without just compensation and against the will of the property owner.

The practical effects of being forced into a landlord and tenant relationship by government is that government, by its laws and regulations, imposes involuntary servitude on petitioner, which if not complied with subjects petitioner to criminal and civil penalties. The responsibility and duty to supply a tenant in an apartment with heat so the tenant will not become ill is one

of those duties. The maintenance of door locks so an intruder will not physically assault the tenant in the apartment is a second important responsibility. In the event the tenant allows a young child to reside in the apartment, under N.Y. City law, the owner of the apartment has the responsibility and duty to discover this fact and install window guards to protect the person of the child from falling out a window and sustaining serious injury. There are many other additional duties that government imposes upon an owner of an apartment which are for the purpose of protecting the person of the tenant, but they should be applicable only to those owners who choose their tenants and knowingly subject themselves to these responsibilities. In this instance government has selected petitioner and said you must assume these responsibilites and perform these duties. Eminent domain could not impose such responsibilities and duties upon

petitioner, but RSC 2523.5(b)(2) does.

The petitioner believes that these forced duties and responsibilities imposed by government on petitioner, against the will of the petitioner, subjects petitioner to involuntary servitude which is prohibited by § 1 of the 13th Amendment to the U.S. Constitution.

CONCLUSION

The order of the Court of Appeals which held that there is no substantial constitutional question involved in this appeal, conflicts with applicable decisions of this Court, such as *Loretto v Teleprompter Manhattan CATV Corp.*, (supra), *Nollan v California Coastal Commission*, (supra), *Pennsylvania Coal Co. v Mahon*, (supra) and others. RSC 2523.5(b)(2) presents new, novel and revolutionary changes to the Real Property Law and the law of Eminent Domain, and also conflicts with the 5th, 13th and 14th Amendments to the U.S. Constitution, and applicable decisions of this Court.

Although petitioner has focused here on the unlawful taking of petitioner's private property, there are many others similarly situated. It is estimated that there are approximately 800,000 apartments which are subject to the N.Y. City Rent Stabilization Law and a decision in this appeal will have general importance to the owners, tenants and occupants of these apartments.

Petitioner respectfully submits that the appeal warrants plenary consideration by this Court.

Dated: Great Neck, New York
February 16, 1991

Respectfully submitted

Leonard Cohen, pro se
Counsel of Record
66 Beverly Road
Great Neck, N.Y. 11021
(516) 487-4994

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of November A. D. 1990

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

Mo. No. 1169

Leonard Cohen,

Appellant,

v.

Ernestine Berger,

Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken as of right &c. by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks to dismiss the appeal taken as of right, be and the same hereby is granted and appeal dismissed, with four hundred dollars

costs and one hundred dollars costs of motion, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion, insofar as it seeks sanctions and attorney's fees, be and the same hereby is denied.

Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:SECOND JUDICIAL DEPARTMENT

Index # 20318/87
3097w
Z/hu
Submitted-May 11, 1989

AD2d

RICHARD A. BROWN, J.P.
SYBIL HART KOOPER
STANLEY HARWOOD
ALBERT M ROSENBLATT, JJ.

767E DECISION & ORDER

Leonard Cohen, respondent, v. Ernestine Berger, appellant.

Kenneth A. Reiver, Cedarhurst, N.Y., for appellant.

Leonard Cohen, Great Neck, N.Y., respondent *pro se*.

In an action for a judgment declaring that the defendant has no right to occupy apartment 5E in a premises located at 1430 Seagirt Boulevard, Far Rockaway, and for the ejectment of the defendant, the defendant appeals from an order of the Supreme Court, Queens County (Leviss, J.), dated April 7, 1988, which granted the plaintiff's motion for summary judgment, held that the defendant's rights to the leasehold interest in the subject apartment expired upon the death of her mother, the tenant of record, ejected the defendant from the subject apartment, found the defendant liable for the use and occupancy of the apartment, and set the matter down for an inquest to determine the fair value of her use and occupancy.

ORDERED that the order is reversed, on the law, with costs, the plaintiff's motion is denied, upon searching the record, summary

judgment is awarded to the defendant to the extent that it is declared that, pursuant to 9 NYCRR 2523.5(b)(2), she is entitled to a renewal lease for the subject apartment, and the matter is remitted to Supreme Court, Queens County, for a hearing to determine the amount of rent arrears owed by the defendant to the plaintiff.

The plaintiff is the owner of apartment 5E at 1430 Seagirt Boulevard in Queens. The defendant's deceased parents, Harry and Eva Silverman, resided in that apartment as rent-stabilized tenants, commencing in 1964. In 1976 Harry Silverman died. Eva Silverman continued to reside in the apartment, pursuant to a series of renewal leases, the last of which was to expire on October 31, 1987, until her death on or about December 23, 1985.

A few years after the inception of the original lease, the defendant daughter moved into the apartment with her parents, and

continued to reside there after the death of her mother. In 1987, she informed the plaintiff owner that her mother was deceased, and requested that her name be substituted on the renewal lease. The owner refused to change the lease, and advised the daughter that the only tenant of record was Eva Silverman, who was deceased, and that she, as daughter, was not entitled to a renewal lease.

The owner sought, *inter alia*, a declaration that the leasehold interest of Eva Silverman expired as of October 31, 1987, and that all rights of the daughter to occupy the subject apartment expired upon the death of her mother, Eva Silverman.

The daughter argued that she was entitled to a renewal lease pursuant to 9 NYCRR 2523.5(b)(2). That section, which became effective May 1, 1987, provides that:

> "If the tenant is deceased at the expiration of the lease term, such tenant's family member who has not

> resided in the housing accommodation since the inception of the tenancy or the commencement of the relationship, but who has been residing with such tenant in the housing accommodation as a primary resident for a period of no less than two years immediately prior to the death of the tenant *** shall be entitled to a renewal lease."

There is no dispute that the daughter is a family member as defined by the Rent Stabilization Code (9 NYCRR 2520.6.[o]), and that she meets the two-year primary resident requirement.

The Supreme Court granted the owner's motion for summary judgment, holding that 9 NYCRR 2523.5(b)(2) was invalid, and that inasmuch as the daughter was not a named tenant in the lease, she was not entitled to renewal of the lease under the Rent Stabilization Code.

We disagree, and reverse.

Before the promulgation of 9 NYCRR 2523.5(b)(2), there was a statutory and regulatory void as to the definition of the term "tenant" with regard to the renewal of

leases governed by the Rent Stabilization Code. In *Sullivan v Brevard Assoc.* (66 NY2d 489, 490-491, 493), the Court of Appeals held that in the absence of any definition of the term "tenant" in the Rent Stabilization Code, only the lease definition of tenant applied, and "a landlord need offer a renewal lease only to a tenant of record, and is not obligated to offer a renewal lease to a relative of the tenant who occupies the apartment with the tenant during a portion of the lease term".

In 1985, the Legislature delegated to the New York State Division of Housing and Community Renewal (hereinafter the DHCR) the authority to amend the Rent Stabilization Code (*see,* Administrative Code of the City of New York § 26-511[b], formerly § YY51-6.0[b]), a quasi-legislative enactment (*see, Bryant Ave. Tenants' Assn. v Koch,* 71 NY2d 856, 858), and to adopt provisions which, "in general, [protects] tenants and the public interest" (Administrative Code § 26-511[c][1],

formerly § YY51-6.0[c][1]). It was in the exercise of this authority that the DHCR adopted 9 NYCRR 2523.5(b)(2) (*Festa v Leshen,* 145 AD2d 49, 56).

"DHCR's interpretation of the statutes it administers, if not unreasonable or irrational, is entitled to deference" (*Matter of Salvati v Eimicke,* 72 NY2D 784,791). We agree with the Appellate Division, First Department, that the DHCR did not exceed its authority in enacting 9NYCRR 2523.5(b)(2) (*see, Festa v Leschen, supra).* There is nothing in the legislative history of the Rent Stabilization Code which indicates that this seciton is adverse to the purposes of the law. Moveover, dicta in a recent Court of Appeals decision (*Braschi v Stahl Assocs.*, ___NY2d _____[July 6, 1989]), implicitly approves the definition of tenant in 9 NYCRR 2523.5(b)(2) and contains nothing to suggest that our conclusion should be other than it is. Accordingly, the defendant is entitled to

summary judgment.

BROWN, J.P., KOOPER, HARWOOD and ROSENBLATT, JJ., concur.

ENTER:

MARTIN H. BROWNSTEIN

Martin H. Brownstein

Clerk

At an IA Part 6 of the Supreme Court of the State of New York, County of Queens, held at the Court House, 88-11 Sutphin Blvd., Jamaica, New York on the 7th day of April, 1988.

PRESENT: HON. SIDNEY LEVISS

Justice

- - - - - - - - - - - - - -X

LEONARD COHEN,

Plaintiff,

ORDER FOR PARTIAL SUMMARY JUDGMENT

-against-

Index No. 20381-1987

ERNESTINE BERGER,

Defendant.

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The plaintiff herein having duly moved

for an order pursuant to CPLR 3212 for summary judgment for a declaratory judgment, a judgment for immediate possession of a cooperative apartment and for a judgment for the use and occupancy of said cooperative apartment,

NOW, upon reading and filing the Notice of Motion dated December 12, 1987, the affidavit of LEONARD COHEN. sworn to on the 12th day of December, 1987, the summons, amended verified complaint, verified answer to amended complaint, and the reply affidavit of LEONARD COHEN, sworn to on the 8th day of January, 1988, all in support of said motion, and the affirmation of the defendant's attorney, KENNETH A. REIVER, Esq., affirmed on December 23, 1987, in opposition to the motion, and after due deliberation having been had, and upon the Court's memorandum dated March 14, 1988, and it appearing that there are no triable issues of fact other than the question of the amount of monies which

are due and owing to the plaintiff from the defendant for the use and occupancy for said cooperative apartment,

NOW, upon motion of LEONARD COHEN, plaintiff herein, it is

ORDERED, that the motion for partial summary judgment is hereby in all respects granted, and it is further

ORDERED AND DECREED, and the Court finds

a) that the leasehold interest EVA SILVERMAN, deceased, had for Apartment 5E in the premises located at 1430 Seagirt Blvd., Far Rockaway, in the County of Queens, City and State of New York expired and terminated on October 31, 1987, and

b) that all rights the defendant, ERNESTINE BERGER, had to occupy said apartment expired upon the death of EVA SILVERMAN, deceased, and it is further

ORDERED, that the plaintiff have final judgment for immediate possession of

Apartment 5E in the premises located at 1430 Seagirt Blvd., Far Rockaway, in the County of Queens, City and State of New York, and it is further

ORDERED, that the Sheriff of the City of New York be and he hereby is ordered, upon receipt of a certified copy of this ORDER, to enter upon the premises located at 1430 Seagirt Blvd., Far Rockaway, in the County of Queens, City and State of New York and eject the defendant, ERNESTINE BERGER from Apartment 5E, and every other person therein, together with their possessions, and to put the plaintiff, LEONARD COHEN, into possession of said apartment, and that this order be executed by the Sheriff as though it were an execution for the delivery of possession of the premises, and it is further

ORDERED, that the execution of this order to Sheriff of the City of New York to eject the defendant and every other person therein, together with their possessions from

said apartment be stayed for 90 days from the service of a copy of this order with notice of entry upon defendant's attorney, and it is further

ORDERED, that the plaintiff have judgment as to liability against the defendant for the use and occupancy of said cooperative apartment, and it is further

ORDERED, that upon proof of filing of a note of issue, statement of readiness and compliance with all the rules of this court, it is

ORDERED, that an inquest be held before this Court, IAS Part 6, on the 2nd day of June, 1988 at 9:30 o'clock in the forenoon of said day to determine the fair value for the use and occupancy of Apartment 5E, in the premises located at 1430 Seagirt Blvd., Far Rockaway, in the County of Queens, City and State of New York to be due and owing by defendant to plaintiff from the date of the death of EVA SILVERMAN, deceased, up

through and including the date for which possession of the said apartment is surrendered to plaintiff and/or possession is obtained by plaintiff, and it is further

ORDERED, that this order be binding upon the defendant and her successors and assigns, and it is

ORDERED, that a copy of this order with Notice of Entry thereon shall be served upon the defendant and upon the Trial Support Office of this Court on or before the 19th day of May, 1988, and it is further

ORDERED, that upon the rendering of said assessment the Plaintiff have and recover judgment against the defendant in the sum for which damages are thus fixed, together with the costs of the action to be taxed by the Clerk of the Court, and said Clerk is directed to enter judgment in favor of the plaintiff and against the defendant for said sum in which damages are thus fixed, together with the costs of the action as taxed, if authorized by

statute.

ENTER

S.L.

J.S.C.

MEMORANDUM

Supreme Court, Queens County
IA Part 6

LEONARD COHEN	:	INDEX NO. 20381/87
- against -	:	BY: LEVISS, J.
ERNESTINE BERGER	:	DATED: MARCH 14, 1988

In this action for a declaratory judgment, ejectment and monetary damages, the plaintiff moves pursuant to CPLR 3212 for summary judgment.

The facts in this case are undisputed. The plaintiff is the owner of a cooperative apartment located at 1430 Seagirt Blvd., Far Rockaway, New York. In 1964, the

apartment was leased by plaintiff to Harry and Eva Silverman. A few years thereafter, the tenants' daughter, defendant Ernestine Berger, moved into the apartment with her parents. After the death of Harry Silverman, Eva Silverman remained in the apartment with her daughter.

From the start of the tenancy, all written leases and renewals were made in the name of Harry Silverman and Eva Silverman. After Harry Silverman's death, all renewals were made in the name of Eva Silverman. No written lease or renewal was ever made with, or in the name of, Ernestine Berger.

The last lease renewal agreement made between plaintiff and Eva Silverman was for the period beginning November 1, 1985 and ending on October 31, 1987. Although Eva Silverman died on December 23, 1985, plaintiff was not notified of this fact by the defendant.

On June 17, 1987, in the belief that Eva Silverman was still alive, plaintiff mailed a

letter to her in which he informed her that her lease agreement was to expire on October 31, 1987 and that she could renew the lease. In August, plaintiff received a note from defendant asking that the lease be renewed for one year. Since, at that time, plaintiff believed that Eva Silverman was still alive, plaintiff prepared the lease in the name of Eva Silverman and mailed it to her. A couple of weeks later, plaintiff received a letter from defendant which informed him that defendant's mother was deceased and requested that plaintiff change the name on the lease to Ernestine Berger. On October 16, 1987, plaintiff sent a letter to defendant stating that he did not recognize her as a tenant and demanded that she vacate the apartment no later than October 31, 1987. Defendant's refusal to move and return possession of the apartment to the plaintiff has resulted in this lawsuit.

In opposition to plaintiff's motion for

summary judgment, defendant contends that, under section 2523.5(b)(2) of the New York City Rent Stabilization Code (hereinafter "RSC"), the defendant is, as a matter of law, entitled to a renewal lease. That section provides in part as follows:

> "*** if the tenant is deceased at the expiration of the lease term, such tenant's family member who has not resided in the housing accommodation since the inception of the tenancy or the commencement of the relationship, but who has been residing with such tenant in the housing accommodation as a primary resident for a period of no less than two (2) years immediately prior to the death of the tenant, *** shall be entitled to a renewal lease."

In reply, the plaintiff contends that the section of the RSC relied upon by the defendant is invalid and void inasmuch as the Commission of the Department of Housing and Community Renewal (hereafter "DHCR") did not have the authority or the right to insert this provision in the RSC.

The Court of Appeals in Sullivan v Brevard Associates (66 NY2d 489) held that

there are no succession rights established under the Rent Stabilization Law and that a landlord is required to offer a renewal lease only to a tenant of record. In reponse to that decision, the Commisioner of DHCR issued Emergency Operational Bulletin No 85-1 which purported to establish succession rights.

In Two Associates v Brown (127 AD2d 173, 182-183), the court declared Emergency Operational Bulletin No. 85-1 to be invalid. The court therein stated:

> "***in light of the clear language of the Rent Stabilization Law and the judicial construction of that language, it cannot be said that, in issuing the emergency bulletin the Commissioner was merely interpreting or administering the existing regulations. On the contrary, the bulletin's 'rules' are designed to extend the protection of the Rent Stabilization Law to parties the Legislature never intended to protect. The effect of the bulletin is not to define the existing word 'tenant' in the regulations governing lease renewals, a word that is unambiguous, but is rather to create a new law entitling a new broad class of people to a lease renewal. The Commissioner may not so act in the absence of a legislative amend-

> ment of the Law or without properly moving to amend the Code as specified in the Law."

In May 1987, DHCR adopted a new RSC. The new RSC also attempted to provide for succession rights to rent stabilized leaseholds. In East Four-Forty Associates v. Ewell (__ Misc 2d, __, NYLJ, Feb. 24, 1988, p 11, col 1.) the Appellate Term, First Department, held invalid the succession provisions of the new RSC. The court therein stated:

> "*** It is manifestly inappropriate for an administrative agency, no matter how worthy its motives, to disregard the intent of the Legislative - particularly where that intent has so recently and so clearly been construed by our highest court - and create through administrative fiat rights never contemplated by the Legislature. ***" (col 3)
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> ***
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> "*** in the absence of an amendment to the Rent Stabilization Law by the Legislature expressly expanding the definition of 'tenant' under the Rent Stabilization Law to include persons other than tenants of record and expanding rights afforded by the Rent Stabilization Law to such ad-

> ditionally included persons, it is our view that any attempt by DHCR, in the form of an amendment of the Rent Stabilization Code or otherwise, to create succession rights must fail". (col 4)

This court, therefore, finds and declares that section 2523.5(b)(2) of the RSC is invalid and inasmuch as defendant Berger is not named in the lease as a tenant, she is not entitled to renewal of the lease under the Rent Stabilization Law.

Accordingly, the plaintiff's motion for summary judgment is granted. The portion of the complaint seeking monetary damage, shall be set down for an inquest.

Settle order.

.....S.L.....
J.S.C.